IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1486

JOSE GUADALUPE GARZA, JR.,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

77-1486

Homero Margil Lopez
349 Padares Line Road
Brownsville, Tex. 78520

FOR PETR

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

JOSE GUADALUPE GARZA, JR.,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jose Guadalupe Garza, Jr., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on February 21, 1978.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix, infra, p. 5a) is reported in ____ F.2d ____. The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the Court below (Appendix, infra, p. 5a) was entered on February 21, 1978. Rehearing was denied on March 30, 1978 (Appendix, infra, pp. 6a-7a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government can destroy evidence before the right of the Defendant to examine that evidence matures and thus avoid the consequences of *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194.

2. What degree of evidence is necessary in order to establish the "reason" for the delay under *United States* v. *Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 4555 and *United States* v. *Lovasco*, ___ U.S. ___, 52 L.Ed.2d 752, 97 S.Ct. ___.

3. Whether the Trial Court can find the reason for the delay was "investigation" when there was no evidence to that effect. *Marion* and *Lovasco*, supra.

4. Whether or not the destruction of evidence by the Government during an investigation raises the presumption that it was done in order to obtain a tactical advantage. *Marion* and *Lovasco*, supra.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment of the United States Constitution; "In all criminal prosecution, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceeding in the case now before this Court.

On the 14th day of July, 1977, in a cause then pending in the United States District Court for the Southern District of Texas, Brownsville Division, entitled, *"The United States of America* v. *Jose Guadalupe Garza, Jr."*, Criminal No. B-77-148, Petitioner was found guilty by a jury on an indictment of 4 counts charging violations of 21 U.S.C. 846 & 841(A), Conspiracy to possess, heroin 21 U.S.C. 841(A)(1), distribution of heroin and 2 counts of using a communications facility in facilitation of a felony 21 U.S.C. 841(A)(1) and 21 U.S.C. 843(B).

On the 19th day of August, 1977, the District Court entered judgment and Petitioner was sentenced to twelve (12) years imprisonment to be followed by a special parole term of five (5) years on each of Counts One and Two; and to Three (3) years imprisonment on

each of Counts Three and Four. The terms were to run consecutively for a total of thirty (30) years imprisonment with a special parole term of ten (10) years.

B. Relevant facts concerning the underlying conviction.

The Appellant was tried and convicted on July 14, 1977, for acts which occurred on or about August 15, 1973 to September 7, 1973 (Indictment, Appendix p. 1a) some forty-four (44) months later. All of the counts of the indictment began on or about the 15 day of August, 1973, and ended on September 7, 1973, including the conspiracy. Three of the co-conspirators were arrested at the "buy-bust" on September 7, 1973 and were tried and convicted on October 23, 1973, only one other conspirator was arrested with Appellant and he plead guilty on June 10, 1977, without challenge to the time span. Appellant was not arrested, detained or charged with these crimes until his indictment in 1977, that at his first opportunity he moved for dismissal on the grounds that the 44 months violated his constitutional right to a speedy trial under the 6th Amendment, a hearing was heard on that point on June 10, 1977. At that hearing, the reason for the delay was explained by the Government through its D.E.A. agent Lunt; because he did not become aware of Appellant's participation until March. Based only upon this evidence the Trial Court made the finding that there was a good-faith investigation under *Marion* and denied the motion to quash.

Also on June 10, 1977, and again at the Appellant's first opportunity, the Appellant made a motion to have

his own or an independent chemist examine the Heroin he was accused of possessing. This was granted partially on the statements of the prosecutor, "that the Heroin was at the D.E.A. Lab in Dallas," however, the heroin had already been destroyed on July 16, 1974, a fact which became apparent at the trial.

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court.

This is a suppression of evidence case. In the instant case, the Appellant was denied the opportunity to have his own expert examine the heroin, for which he was on trial: although it was admitted that he had that right. (The trial court even granting Appellant's pretrial motion in that regard) Yet the Government circumvented this right by destroying the evidence before the pretrial; in point of fact, the Government had destroyed the evidence long before the Appellant was arrested, or charged with any offense.

Since it would have been in violation of *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, if the Appellant had requested to examine the evidence and then the Government had destroyed it. The same reasoning would apply if the evidence is destroyed before it is requested. This is especially true if the evidence is destroyed before the Appellant's right to request matures, i.e., before he is even charged with a crime.

If this procedure were to go unchecked, it would allow the Government to sift through the evidence and witnesses against an individual before charging him with an offense and to arbitrarily sort out the good and the bad and then after the individual is charged, to use the excuse that the Government no longer has the evidence. Even if this is done in good faith an individual's right has been denied, and it still amounts to an ingenious method of avoiding the consequences of *Brady*, specifically; "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."

B.

The Court of Appeals has decided on important questions of Federal Law which have not been, but should be settled by this Court.

Although the Speedy Trial Clause of the Sixth Amendment is applicable only after a person has been accused of a crime and statutes of limitation provide "the primary guarantee against bringing overly stale criminal charges," *United States* v. *Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 4555, those statutes do not fully define a defendant's rights with respect to events antedating the indictment, and the Due Process Clause has a limited role to play in protecting against oppressive delay.

While proof of prejudice makes a due process claim ripe for adjudication, it does not automatically

validate such a claim and the reasons for the delay must also be considered.

To prosecute a Defendant following *good-faith investigative* delay . . . does not deprive him of due process even if his defense might have been somewhat prejudiced by the lapse of time. *United States* v. *Lovasco*, ___ U.S. ___, 52 L.Ed.2d 752, 97 S.Ct. ___.

In *Lavasco*, Justice Stevens dissented on the grounds that there was no evidence to support the reason for the delay. In the present case not only is there no evidence of a continuing good faith investigation, but if looked at circumstantially, there is evidence that the so-called investigation had terminated years prior to the trial.

In the instant case, the trial judge made a finding that the reason for the delay was investigative, in spite of the fact that *NO* witness ever testified that there was an investigation, and unlike *Lavasco*, did not even base his ruling on statement of counsel.

From a circumstantial viewpoint, that ruling is illogical. The co-defendants, the people who actually sold the heroin to the undercover agents, were arrested, tried and convicted, long before the Appellant was charged. At the time of the co-defendant's arrest, the transaction ended, (the undercover agents having exposed themselves at that point). The Government either had a case then or they did not. There was no indication at that time that a further investigation would reveal any more witnesses or evidence, and no one testified that they were looking. Under the facts of this

case there was no reason to look; there was simply nothing to find, either in the way of witnesses or evidence.

The only evidence offered by the government was that 44 months after the crime was committed an agent talked to two witnesses who knew of the Appellants' involvement, there was no evidence that these witnesses were unavailable or hard to locate, or that they had refused to testify. No explanation was given as to why they were not interviewed 44 months earlier.

The problem then is how much proof does the trial court need in order to make the determination that the reason for the delay is a good-faith investigation; Appellant feels that there must be at least a scintilla, particularly when there is evidence to the contrary.

CONCLUSION

The judgment below is a unique and salutory departure from decisions of this Court which require that the Government not suppress evidence favorable to the Defendant and that he be granted a fair and speedy trial under the 6th Amendment. This Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

NAGO ALANIZ
Counsel for Petitioner
P. O. Box 539
San Diego, Texas

CERTIFICATE OF SERVICE

I, Nago Alaniz, hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the ____ day of April, 1978.

Nago Alaniz

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

versus Cr. No. B-77-184

JOSE GUADALUPE GARZA, JR.
ADOLIO LAZARO CRUZ

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

That from on or about August 15, 1973, to on or about September 7, 1973, within the Brownsville Division of the Southern District of Texas, elsewhere, JOSE GUADALUPE GARZA, JR., and ADOLIO LAZARO CRUZ, hereinafter called defendants, and Efrain Leal Cavazos, Juan Trevino De La Cruz, and Luis Torres, co-conspirators but not co-defendants, knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute, a quantity of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, in violation of Sections 846 and 841(a)(1), Title 21, United States Code.

Pursuant to and for the purpose of carrying out said unlawful combination, confederation, conspiracy, and agreement and to effectuate the objects thereof, the following and other overt acts were committed within the Brownsville Division of the Southern District of Texas:

Overt Acts

1. On or about August 19, 1973, JOSE GUADALUPE GARZA, JR., ADOLIO LAZARO CRUZ, Juan Trevino De La Cruz, and an unidentified male had a meeting at a Kip's Restaurant in Dallas, Texas, with two undercover special agents of the Drug Enforcement Administration.

2. On or about August 21, 1973, JOSE GUADALUPE GARZA, JR., had a telephone conversation with an undercover agent of the Drug Enforcement Administration.

3. On or about September 4, 1973, Efrain Leal Cavazos and Juan Trevino De La Cruz had a meeting with an undercover agent of the Drug Enforcement Administration at the No-Ka-Oi Lounge, 909 Savannah, McAllen, Texas.

COUNT 2

That on or about September 6, 1973, within the Brownsville Division of the Southern District of Tex-

as, and within the jurisdiction of this Court, JOSE GUADALUPE GARZA, JR., and ADOLIO LAZARO CRUZ did knowingly and intentionally distribute approximately two (2) pounds, one-fourth (1/4) ounces of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, contrary to Section 841(a)(1), Title 21, United States Code.

COUNT 3

That on or about August 21, 1973, in the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, JOSE GUADALUPE GARZA, JR., did knowingly and intentionally use a communications facility, that is a telephone, in facilitating the distribution of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, such a distribution being a felony under Title 21, United States Code, Section 841(a)(1), in violation of Section 843(b), Title 21, United States Code.

COUNT 4

That on or about August 22, 1973, in the Southern District of Texas, and within the jurisdiction of this Court, JOSE GUADALUPE GARZA, JR., did knowingly and intentionally use a communications facility, that is a telephone, in facilitating the distribution of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, such a distribution being a felony under Title 21, United States

Code, Section 841(a)(1), in violation of Section 843(b), Title 21, United States Code.

A TRUE BILL:

FOREMAN OF THE GRAND JURY

EDWARD B. McDONOUGH, JR.
UNITED STATES ATTORNEY
/s/ JOHN PATRICK SMITH
JOHN PATRICK SMITH
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5543
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSE GUADALUPE GARZA, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(February 21, 1978)

BEFORE RONEY, GEE and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

March 30, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5543 — U.S.A. v. JOSE GUADALUPE GARZA, JR.

Dear Counsel:

The enclosed order has this day been entered on petition for rehearing.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

bmh

enclosure

cc: Mr. Nago Alaniz
Mr. James R. Gough, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5543

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSE GUADALUPE GARZA, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(March 30, 1978)

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ THOMAS GIBBS GEE
United States Circuit Judge

No. 77-1486

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSE GUADALUPE GARZA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

SIDNEY M. GLAZER,
PATTY ELLEN MERKAMP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1486

JOSE GUADALUPE GARZA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. 5a).

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978, and a petition for rehearing was denied on March 30, 1978. The petition for a writ of certiorari was filed on April 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Drug Enforcement Administration's good faith pretrial destruction of the heroin that petitioner was charged with distributing deprived him of a fair trial.

2. Whether a pre-indictment delay of 44 months violated petitioner's right to due process.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to distribute heroin, distribution of heroin, and of two counts charging the use of a telephone in facilitating the distribution of heroin, in violation of 21 U.S.C. 846, 841(a)(1), and 843(b). He was sentenced to a total of 30 years' imprisonment to be followed by a ten-year special parole term (Pet. 3-4). The court of appeals affirmed (Pet. App. 5a).

In August 1973, a government informant in Dallas asked Efrain Cavazos of McAllen, Texas, whether he could sell the informant some heroin; since Cavazos had none, he contacted Juan De La Cruz and petitioner (Tr. 89-93). The informant reported his negotiations to the Drug Enforcement Administration (Tr. 182). Thereafter, DEA Agent Lunt met with Adolio Cruz, Juan De La Cruz, and petitioner in Dallas to discuss a sale of a kilogram of heroin (Tr. 133-140); further negotiations between Lunt and petitioner took place over the telephone on August 21 and 22 (Tr. 190-196). Then, on September 4, 1973, the government informant notified Lunt that the McAllen group would not deliver heroin to Dallas as Lunt had expected (Tr. 200).

Accordingly, DEA agents in McAllen took over the investigation (Tr. 200-201). The informant arranged for the agents to meet with De La Cruz and Cavazos, who agreed to sell the agents heroin (Tr. 259-260). On September 6, 1973, De La Cruz, Cavazos, and Luis Torres diluted the heroin with brown sugar (Tr. 126). Then De La Cruz and the informant delivered approximately a kilogram of the heroin to the agents (Tr. 271). De La Cruz, Cavazos, and Torres were arrested (Tr. 125, 271). The agents were advised that the man who had supplied the heroin would be waiting in a truck at a Sears parking lot in McAllen to receive payment, but when they reached the lot they found no one answering this description (Tr. 287-288).

Cavazos, De La Cruz and Torres were convicted of offenses involving this sale in October of 1973, and on July 16, 1974, the heroin from that sale was destroyed at the DEA lab in Dallas, although the reports of the DEA chemist's analysis of the substance were preserved (Tr. 334).

The DEA agents in McAllen had no dealings with petitioner, and DEA did not establish the connection between the McAllen transaction and the incomplete Dallas transaction in which petitioner had figured (Tr. 35-36). In March of 1977, DEA agents first obtained information from two sources that petitioner had been the supplier of the heroin who had waited in the Sears parking lot (Tr. 27-32, 318). Petitioner was indicted in April 1977 and tried in July 1977.

Prior to trial, petitioner moved to have his own expert examine and analyze the heroin (Tr. 6-7). The district court granted the motion, stating that petitioner should inform the government of the identity of the chemist to whom the sample of the heroin should be sent for examination (Tr. 7). At this time neither party was aware that the heroin had already been destroyed. Petitioner never gave the government the name of a chemist to whom the heroin should be sent (Tr. 334). Prior to trial the government did, however, send petitioner copies of the DEA chemist's reports confirming that the substance was heroin (Tr. 333). At trial, after the DEA chemist testified—without objection from petitioner—that he had analyzed the substance delivered to the agents in the September 1973 transaction and determined that it was heroin (Tr. 328-332), petitioner's counsel then informed the court that he could not recall whether the government

had ever complied with his discovery motion seeking a sample of the heroin for testing (Tr. 333). Counsel for the government stated that the heroin had been routinely destroyed in July of 1974 (Tr. 333-334). Petitioner then objected to the chemist's testimony and did not cross-examine the chemist (Tr. 333-335).

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the destruction of the heroin before his expert could independently test it deprived him of a fair trial. This argument is without merit.

When evidence relevant to a criminal case is destroyed or lost by the government before trial, a defendant's conviction will not be reversed absent a showing of bad faith on the part of the government or prejudice to the defendant. *Government of the Virgin Islands* v. *Testamark*, 570 F. 2d 1162 (C.A. 3); *United States* v. *Picariello*, 568 F. 2d 222 (C.A. 1); *United States* v. *Heiden*, 508 F. 2d 898, 902 (C.A. 9); *United States* v. *Henry*, 487 F. 2d 912 (C.A. 9); *United States* v. *Sewar*, 468 F. 2d 236 (C.A. 9), certiorari denied, 410 U.S. 916.

Petitioner does not contend that the government acted in bad faith (see Pet. 4), and the record furnishes no support for such an inference. The heroin was destroyed after the successful prosecution of all the participants in the sale that were initially known to the government and before additional evidence came to light that warranted petitioner's prosecution.

Moreover, the record discloses that petitioner suffered no prejudice as a result of the destruction of the heroin, since he had never made any effort to obtain a sample of the heroin for independent testing prior to trial. Petitioner offers no reason to believe that the substance was not in fact heroin, as the DEA's tests

indicated. To the contrary, the other evidence in the case corroborated DEA's identification of the substance. Before the heroin was delivered, co-conspirator Torres had tested it to determine if it was satisfactory by injecting himself (Tr. 522-523), and the DEA agents testified that they had field tested it three times with positive results before they accepted delivery and made the initial arrests (Tr. 269-271).

2. Petitioner also contends (Pet. 6-8) that the 44-month pre-indictment delay violated his right to due process. But, as this Court held in *United States* v. *Lovasco*, 431 U.S. 783, 796, "* * * to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." Petitioner urges (Pet. 7) that this case is distinguishable from *Lovasco* because there was no evidence that there was a continuing investigation after the arrest and conviction of Torres, De La Cruz, and Cavazos; he argues that the government "either had a case then or they did not." To the contrary, however, the government's evidence showed that petitioner's connection with the sale in question did not become clear until March of 1977, when two persons told a DEA agent about petitioner's involvement. The agent who learned of petitioner's involvement from these sources testified that the delay in petitioner's prosecution did not result from efforts to gain any tactical advantage (Tr. 36). The district court credited this testimony and denied petitioner's motion to dismiss on the grounds that the pre-indictment delay was investigative in nature (Memorandum Order of July 11, 1977, reprinted as Appendix C to the government's brief in the court of appeals). Additionally, the district court also found that petitioner's general allegations of his impaired memory were insufficient to establish that any substantial prejudice resulted from the delay (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

SIDNEY M. GLAZER,
PATTY E. MERKAMP,
Attorneys.

JUNE 1978.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1486

JOSE GUADALUPE GARZA, JR.,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER PURSUANT TO RULE 24(4)

HOMERO M. LOPEZ
Attorney at Law
349 Paredes Line Road
Brownsville, Texas 78520
Phone: (512) 546-1934

NAGO ALANIZ
Attorney at Law
P. O. Box 529
San Diego, Texas 78384
Phone: (512) 882-6936
Counsel for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 77-1486

JOSE GUADALUPE GARZA, JR.,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER PURSUANT TO RULE 24(4)

QUESTIONS IN DISPUTE

1. Whether the Drug Enforcement Administration's pretrial destruction of the heroin was done in good faith?

2. Whether there existed a *valid* reason for the delay?

STATEMENT

For the purposes of this reply brief, Petitioner will adopt substantially, the testimony of the trial court as

it is summarized in both the Petitioner's writ and the government's brief in opposition.

ARGUMENT

The government in its brief in opposition states that one of the questions presented is "whether the Drug Enforcement Administration's 'good-faith' pretrial destruction of the heroin that Petitioner was charged with distributing deprived him of a fair trial," apparently deriving this question from a misinterpretation that the "Petitioner does not contend that the government acted in bad-faith . . . . . , and the record furnishes no support for such an inference." (Brief p. 4)

To be more accurate, the question should be, was the destruction done in good faith?

In order to show the conflict in the government's position, attention will be drawn to the factors to be considered in a delay and the factors to be considered when evidence is destroyed. In the former, there are four factors which need to be weighed in determining the accuser's rights;

1. the length of the delay;
2. the reason for the delay;
3. whether the Defendant has asserted his right;
4. the prejudice caused by the delay.

Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182, *United States v. Mac Donald*, ___ U.S. ___, 56 L.Ed.2d 18, 98 S.Ct. ___ (1978).

In the latter, the factors are:

1. Was the evidence material to question of guilt or degree of punishment?
2. Was the Defendant prejudiced by its destruction?
3. Was the government acting in good faith when it destroyed the evidence?

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), cert. denied, 410 U.S. 916, 93 S.Ct. 972, 35 L.Ed.2d 278 (1973); *United States v. Bryant*, 124 U.S. App. D.C. 132, 141, 439 F.2d 642, 651 (1971); *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968). See Comment, "Judicial Response to Governmental Loss or Destruction of Evidence," 39 U. Chi. L. Rev. 542, 563-65 (1972), *United States v. Picariello*, 568 F.2d 222, 227 (5th Cir. 1978).

The contradiction in the government's stand occurs when they take the position that the reason for the delay was a good-faith investigation, yet during that time they destroyed the evidence in "good faith". Their argument is disjunctive, either there was no investigation or the evidence was not destroyed in good faith. (As opposed to bad faith or recklessly) Petitioner feels that the lack of an investigation is the

more valid reason, and would attempt to show the Court that the destruction of the heroin routinely done upon the conviction of the co-conspirators is strong evidence that the government considered the matter closed.

In *Lovasco* the Court stated: that in each case, the prejudice to the defendant is to be weighed against the validity of the government's reason for delay. *United States v. Lovasco*, 431 U.S. at 796, 97 S.Ct. 2044. Petitioner would point out that the reason in this case is a sham, and that the government only discovered an obscure witness to a collateral matter at a time when it needed to explain the delay.

In order to emphasize this position, the Petitioner would ask the Court to look at the government's indictment, remembering that the defendant is guilty as a co-conspirator or principal since he, himself, never delivered any heroin.

Everything that is alleged in the indictment was known to the government in 1973. There are three overt acts alleged and every witness to those acts was known to the government in 1973. Not one new witness or evidence was discovered or looked for during the delay which would further prove or disprove any of those overt acts.

In Count 2, the sale portion of the indictment, the only witnesses to that were the agents and the co-defendants. (Note: the co-defendant's may have been potential witnesses and the government may have had a valid reason to delay until after their conviction but

that would have only been a month's delay.)

The real inconsistency is exaggerated by Counts 3 and 4. There the defendant is charged with using a telephone to further the conspiracy yet there are only two witnesses to these events, the government's agent and the defendant. (Record p. 31) How then can the government delay indicting a person for using a telephone, when there will never be any more evidence that the phone call occurred or did not occur?

The crime itself was a buy-bust situation where the government's agents acting undercover arranged to buy heroin. The only material witness, normally, are the agents and the chemist. The point is that at the time of the buy all the witnesses are known. This can best be explained by hypothesis; suppose that in 1973 the government had moved for continuance. At that time it could not have argued that it needed time to further investigate because there would have been nothing to investigate for. To have predicted in 1973 that it would produce the witness, that it ultimately produced, the government would have had to be clairvoyant. The other witness which the government did not produce would likewise have been useless as grounds for continuance since the Court would hardly allow time to gather evidence which would not even be used.

The only investigation in this case was a conclusion by the trial judge. Not one witness testified that there was an investigation going on. The only testimony being that two witnesses were later talked to. The real fallacy is that not only was there no evidence of any reason for the delay but the delay itself is not explain-

ed. The government offered *no* explanation for the length of time (44 months) before it talked to the witnesses. There was no evidence that the witnesses were unavailable or unidentified or even that the government was busy on other matters.

Surely the Court will require the government to come up with a *valid* reason which at least explains the delay.

To allow this decision to stand would allow the government to rubber stamp every delay with the reason INVESTIGATION regardless of the facts.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

HOMERO M. LOPEZ
NAGO L. ALANIZ

Nago Alaniz
P.O. Box 529
San Diego, Texas

ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Reply Brief for Petitioner have been served upon Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and one copy has been served upon Honorable James Gough, Jr., United States Attorney, P.O. Box 61129, Houston, Texas 77208, by United States Air Mail, with adequate postage affixed thereto, this ____ day of August, 1978.

OF COUNSEL